DEC 20 1993
OFFICE OF THE CLERK

No. 93-644

In the Supreme Court of the United States
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

On Petition For a Writ of Certiorari to the Supreme Court of Oregon

BRIEF IN OPPOSITION

WILLIAM A. GAYLORD
Gaylord & Eyerman, P.C.
1400 SW Montgomery
Portland, Oregon 97201
(503) 222-3526

DAVID A. ENGELS*
Banks, Newcomb & Engels
1212 Standard Plaza
1100 SW 6th Ave.
Portland, Oregon 97204
(503) 222-7475

RAYMOND F. THOMAS
Royce, Swanson, Thomas & Coon
900 American Bank Building
621 SW Morrison Street
Portland, Oregon 97205
(503) 228-5222

Counsel for Respondent
* *Counsel of Record*

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioners' failure to raise, in either the trial court or the Oregon Court of Appeals, their claim that the compensatory damage award violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Supreme Court of Oregon's failure to pass upon the claim bars review of that claim in this Court?

2. Whether the punitive damage award violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution where the ratio of punitive damages to compensatory damages is approximately 5.4 to one and the award is approximately one-tenth of one percent of petitioners' net worth?

TABLE OF CONTENTS

	Page
STATEMENT	2
ARGUMENT	9
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

	Page
Abney v. United States, 431 U.S. 651 (1977)	15
Andrews v. Swartz, 156 U.S. 272 (1895)	15
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	11
Blystone v. Pennsylvania, 494 U.S. 299 (1990)	17
Boyde v. California, 494 U.S. 370 (1990)	17
Brown v. Allen, 344 U.S. 443 (1946)	15
Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989)	11-13
Carter v. Illinois, 329 U.S. 173 (1946)	15
Chicago, R.I. & Pac. Ry. Co. v. Cole, 251 U.S. 54 (1919)	16
Christensen v. Murphy, 296 Or 610, 678 P2d 1210 (1984)	10
Dist. Of Columbia v. Clawans, 300 U.S. 617 (1937)	15
Douglas v. California, 372 U.S. 353 (1963)	15
Ensley-Koebel v. National Guaranty Properties, Inc., 279 Or 391, 568 P2d 655 (1977)	10
Estelle v. Dorrough, 420 U.S. 534 (1975)	15

TABLE OF AUTHORITIES - Continued

	Page
Evitts v. Lucey, 469 U.S. 387 (1985)	15
Ex Parte McCardle, 74 U.S. (7 Wall) 506 (1869)	15
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	10
Gregg v. Georgia, 428 U.S. 153 (1976)	17
Griffin v. Illinois, 351 U.S. 12 (1956)	15
Jones v. Barnes, 463 U.S. 745 (1983)	15
Junck v. Wright, 94 Or.App. 704, 767 P2d 100, *review denied* 308 Or 465, 781 P2d 1214 (1989)	11
Jurek v. Texas, 428 U.S. 262 (1976)	17
Lewis v. Jeffers, 497 U.S. 764 (1990)	14
Lindsey v. Normet, 405 U.S. 56 (1972)	15
McKane v. Durston, 153 U.S. 684 (1894)	15
Murray v. Giarratano, 492 U.S. 1 (1989)	15
National Union v. Arnold, 348 U.S. 37 (1954)	15
Nelson v. Lane County, 79 Or.App.753, 720 P2d 1291, *affirmed* 304 Or 97, 743 P2d 692 (1986)	11
Oberg v. Honda, 316 Or. 263, 851 P2d. 1084, 1092	6-9
Ohio v. Akron Park District, 281 U.S. 74 (1930)	15

TABLE OF AUTHORITIES - Continued

Page

Ortwein v. Schwab, 410 U.S. 656 (1973) 15

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct 1032 (1991) 6, 8-13, 17

Pennsylvania v. Finley, 481 U.S. 551 (1987) 15

Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987) 15

Penry v. Lynaugh, 492 U.S. 302 (1989) 14, 17

Pittsburgh &c. Railway Co. v. Backus, 154 U.S. 421 (1894) 17

Pulley v. Harris, 465 U.S. 37 (1984) 14

Reetz v. Michigan, 188 U.S. 505 (1903) 15

Rogers v. Peck, 199 U.S. 425 (1905) 15

Ross v. Moffitt, 417 U.S. 600 (1974) 15

Smith Kline & French Laboratories v. State Tax Commission, 241 Or 50, 403 P2d 375 (1965) 11

Standard Oil Co. v. Missouri, 224 U.S. 270 (1912) 15, 16

State By and Through State Highway Commission v. Helliwell, 225 Or 588, 358 P2d 719 (1961) 11

State ex rel. Swann v. Pearce, 69 Or.App. 475, 686 P2d 484, *review denied* 298 Or 150, 690 P2d 506 (1984) .. 11

TABLE OF AUTHORITIES - Continued

Page

State v. Montez, 309 Or 564, 789 P2d 1352 (1990) ... 14, 17

State v. Wagner, 305 Or 115, 752 P2d 1136 (1988), affirmed in relevant part on reconsideration, 309 Or 5, 786 P2d 93, *certiorari denied*, 498 U.S. 897 (1990) 14, 17

Travelers Indem. Co. v. American Ins. Co., 278 Or 193, 563 P2d 684 (1977) 11

TXO Production Corp., v. Alliance Resources, 113 S.Ct. 2711 (1993) 10-13, 17

Waller v. Rocky Mountain Fire & Cas. Co. 272 Or 69, 535 P2d 530 (1975) 11

Walton v. Arizona, 497 U.S. 639 (1990) 14

Whitmore v. Arkansas 495 U.S. 149 (1990) 15

Woodson v. North Carolina, 428 U.S. 280 (1976) 15

Statutes

ORS 30.925 7

Miscellaneous

56 Fed. Reg. 47166-47167, September 18, 1991 ..... 4, 5

U.S. Constitution, Article III, Section 2 15

Supreme Court Rule 14(h) 10

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-644

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

On Petition For a Writ of Certiorari to the Supreme Court of Oregon

---

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (Pet. App. 1a - 71a) is reported at 316 Or 263, 851 P.2d 1084. The opinion of the Court of Appeals of Oregon (Pet. App. 72a - 88a) is reported at 108 Or App 43, 814 P.2d 517.

STATEMENT

This case concerns petitioners' attack on a jury verdict awarding respondent $735,512.31 in compensatory damages for petitioners' negligent design, manufacture and marketing of a three-wheel all-terrain vehicle (ATV). As a result of petitioners' negligence, the 325 pound machine abruptly flipped backwards onto respondent and crushed his skull when he attempted to ride it up a hill as illustrated in petitioners' literature. Although petitioners never did the simple pre-manufacturing tests that would have revealed this propensity, they had ample notice of it from both private and public sources and made no effort to adequately warn users. The jury found that petitioners' conduct demonstrated a "wanton disregard for the health, safety and welfare of others" and awarded respondent $5,000,000 in punitive damages.

Petitioners did not assert that the jury's compensatory damage award violated their rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution until they sought discretionary review in the Supreme Court of Oregon. That court did not pass upon petitioners' belated due process challenge to the compensatory damage award. It did, however, reject petitioners' due process challenge to the punitive damage award in a thorough and thoughtful opinion. It found that, taken as a whole, the elaborate procedural safeguards established by Oregon's legislature for awarding punitive damages in product liability actions resulted in a punitive damage verdict that is valid in all respects under the Due Process Clause.

Respondent was injured while riding a three-wheel 1985 model Honda ATC 350X ATV manufactured and sold by petitioners. While his brothers watched, he attempted to climb a short steep embankment with the

ATV at "walking speed." Although respondent was an experienced ATV operator, his first attempt was unsuccessful and he rolled back down. He tried again, leaning further forward, and climbed until the front wheel reached the top of the embankment. Suddenly, the 325 pound vehicle flipped over backwards landing on respondent. Respondent suffered serious injuries including multiple interconnected facial fractures which required that his eye sockets, cheek bones, jaw bones and teeth be wired together; damage to his inner-ear mechanism affecting his balance and cognitive functions; damage to his eye sockets causing double vision; damage to his sinuses and deep skeletal structures causing severe headaches, brain damage resulting in impairment of mental powers including short term memory loss and lowered self-esteem. These injuries (including his altered appearance) are permanent and will limit respondent's employment opportunities.

The 350X ATV -- dubbed the "King of the Hill" in petitioners' advertising -- was one of the highest performance three-wheel models made. Its short wheel base, high traction rear wheels, high torque engine and high center of gravity made it highly unstable. Variations in acceleration, slope or the rider's lean could cause it to instantly flip over onto the rider. Despite the fact that simple engineering tests would have shown that this ATV is prone to such flips on slopes encountered in the ordinary off-road usage for which it is marketed, it had no roll over protection of any kind. Nor did petitioners ever publish any warnings adequately disclosing the ATV's proclivity to flip backwards. In fact, petitioners never performed the simple tests that would have revealed the maximum slope on which this ATV could be safely operated and the rider's narrow to nonexistent margin of error on such slopes. Petitioners also never calculated,

tested or made any design modifications to reduce the likelihood that this ATV would flip over and land on top of the rider -- even after petitioners learned from both private and public sources of similar accidents prior to beginning production of this model.

Despite petitioners' failure to perform adequate testing, internal memoranda and the testimony of former employees revealed that petitioners were fully aware of the stability problems with its three-wheel ATVs. For example, in 1976 Peter Cash, a District Sales Manager for petitioners, submitted a written proposal to American Honda's National Manager of Safety calling for specialized rider training due to the special stability problems of three-wheel ATVs, including their tendency to flip over backwards. Petitioners ignored it. In 1977, American Honda Motor Co. circulated widely in house a written survey of its service representatives that noted the unusual instability of three-wheel ATVs and their tendency to flip over backwards. In addition, when the Consumer Product Safety Commission (a federal agency established to protect consumers from dangerous products) learned of a 23-fold increase in injuries associated with ATVs between 1979 and 1984, it published its data and opened up an investigation. This led to public hearings, private meetings with petitioners, CPSC engineering tests and the publication of numerous documents showing the special instability of three-wheel ATVs.[1]

---

[1]In 1988 all ATV distributors, including petitioners, entered into final consent decrees with the CPSC and the U.S. Department of Justice in which the distributors agreed to halt distribution of three-wheel ATV's. 56 Fed. Reg. 47166-47167, September 18, 1991. In 1991, the CPSC terminated its investigation of other types of ATV's without disturbing the

Despite petitioners' knowledge of the tendency of its three-wheeled ATV to flip over backwards and the acute danger this posed to riders, they made no effort to adequately warn users. In fact, petitioners continued to misrepresent that riders could learn by trial and error to identify hills that could and could not be safely climbed. Meanwhile, sales of petitioners' three-wheeled ATVs "went through the roof."

The jury awarded $919,390.39 as compensatory damages. It allocated 20% of the fault to respondent and 80% to petitioners. The jury also awarded $5,000,000 as punitive damages. The trial court reduced the compensatory damage award by 20% and entered judgment against petitioners for $5,735,512.31. Although in their post-trial motions petitioners asserted that the compensatory damage award was excessive they did not assert that it violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, seeking instead to set aside the verdict on State law grounds only. Petitioners did argue, however, that the punitive damage award violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. After a hearing, the trial judge denied these motions without opinion.

In the Oregon Court of Appeals, petitioners again did not contend that the compensatory damages verdict violated their due process rights arguing only State law grounds in support of reversal. Petitioners, however, again asserted that the punitive damage award violated their due process rights. The Court of Appeals unanimously affirmed in a 19 page opinion that thoroughly analyzed and rejected petitioners' due process

---

consent decrees. 56 Fed. Reg. 47166-47167, September 18, 1991.

challenge to the punitive damage award. It did not pass upon petitioners' State law challenge to the compensatory damage award.

In the Supreme Court of the State of Oregon, petitioners for the first time asserted that *both* the compensatory and punitive damage awards violated their due process rights under the Fourteenth Amendment to the U.S. Constitution. Oregon's Supreme Court thoroughly analyzed and rejected petitioners' due process challenge to the punitive damage award but did not pass upon petitioners' belated due process challenge to the compensatory damage award.

The Oregon Supreme Court began by thoroughly analyzing this Court's opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct 1032 (1991) noting this Court's statement that:

> "One must concede that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. *We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.* We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." [Emphasis added]

Oberg v. Honda, 316 Or. 263, 277, 851 P2d. 1084, 1092. It read this Court's opinion in *Haslip* as identifying

> "the constitutional interests required to be safeguarded in the determination of an award of punitive damages: the constitutional interest in ensuring that the finder of fact has 'adequate guidance' in making such an award and the constitutional interest in ensuring that the amount of the resulting award is 'reasonable.'"

Oberg, supra at 316 Or 280, 851 P2d 1094.

The Oregon court then reviewed the elaborate procedural safeguards required by the Oregon legislature in products liability actions where punitive damages are sought, noting that ORS 30.925 provides:

> 1. That in a products liability civil action punitive damages are not recoverable unless it is "proven by clear and convincing evidence" that the defendant "has shown wanton disregard for the health, safety and welfare of others";
>
> 2. That at trial "evidence of the defendant's ability to pay shall not be admitted unless and until" plaintiff "establishes a prima facie right to recover punitive damages" and that punitive damages shall be determined based upon the following criteria:
>
> a. "The likelihood at the time that serious harm would arise from the defendant's misconduct;
>
> b. The degree of the defendant's awareness of that likelihood;
>
> c. The profitability of the defendant's misconduct;
>
> d. The duration of the misconduct and any concealment of it;

e. The attitude and conduct of the defendant upon discovery of the misconduct;

f. The financial condition of the defendant; and

g. The total deterrent effect of other punishment imposed on the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

Oberg, supra at 316 Or 281, 851 P2d 1094.

The Oregon court held that these safeguards ensure that sufficiently definite and meaningful constraints are imposed on the jury which, in turn, ensures that an award of punitive damages bears a rational relationship to a defendant's conduct and to the need for punishment and deterrence. *Oberg, supra* at 316 Or. 283, 851 P2d 1096. It concluded its review of the procedures employed in this case by comparing the resulting award with the award this Court upheld in *Haslip* and decided that in significant respects they were similar:

> "In *Haslip*, the Court stated that the award of punitive damages, which was upheld, was more than 4 times the amount of compensatory damages and more than 200 times the amount of out-of-pocket expenses of the plaintiff. 111 S Ct at 1046. The proportions here are similar. The award of punitive damages here is about 5.4 times the amount of compensatory damages and about 258 times the amount of out-of-pocket expenses of plaintiff."

Oberg, supra at 316 Or 286n.14, 851 P2d 1097n.14.

Finally, the court rejected petitioners' assertion that due process in all cases requires a broader scope of post-verdict judicial review than is available under Oregon's Constitution. It correctly noted that *Haslip* did not hold that an award of punitive damages must always be subject to a form of judicial review that includes the possibility of remittitur. *Oberg, supra* at 316 Or 284, 851 P2d 1096. Instead, it viewed *Haslip* as concluding that "Alabama procedure, as a whole and in its net effect, did not violate the Due Process Clause." *Id.* at 316 Or 284, 851 P2d 1096. It noted that the criteria employed by the reviewing State courts in *Haslip* (and approved in that opinion) were, in this case, applied by the jury itself *increasing* their protective effect. See *Haslip, supra* 111 S Ct at 1060-61 (O'Conner, J. dissenting) ("Alabama system violates due process, because that system vests standardless discretion *in the jury* to fix a penalty and provides for application of standards only on review of jury award; *jury* should be instructed in, and apply, Alabama criteria"). *Oberg, supra* at 316 Or 284-285; 851 P2d 1096. It concluded that in light of the elaborate safeguards utilized to circumscribe and guide the jury's exercise of its discretion in this case, the constitutionally prescribed measure of judicial review in Oregon (ensuring that the jury was properly instructed and that there was evidence to support an award of punitive damages) was adequate under the Due Process Clause. *Id.*

ARGUMENT

The decision of the Supreme Court of the State of Oregon is correct and does not conflict with any decision of this Court or any other State supreme court or any

court of appeals. Petitioners' belated claim that the compensatory damage award violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution was not properly raised in the Oregon courts, was not passed upon below and is not subject to review here. Petitioners' due process challenge to the punitive damage award is largely of academic interest since they do not claim and cannot claim, in light of this Court's decisions in *Haslip* and *TXO Production Corp., v. Alliance Resources*, 113 S.Ct. 2711, that the award itself is constitutionally excessive. The Oregon Supreme Court carefully considered petitioners' procedural arguments in support of their due process challenge to the punitive damage award and rejected them in a thorough and thoughtful opinion. In these circumstances, further review is unwarranted.

Petitioners' failure to properly raise their claim that the compensatory damage award violated their rights under the Due Process Clause of the Fourteenth Amendment is fatal to their efforts to secure review of that issue in this Court. As petitioners themselves admit, the Oregon Supreme Court did not expressly pass upon the issue. Pet. at 5. In these circumstances it is well settled that "it will be assumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary." *E.g. Exxon Corp. v. Eagerton*, 462 U.S. 176, 181n.3 (1983). Petitioners, however, have made no attempt to make either this showing or the showing required by Supreme Court Rule 14(h).

Nor could they. As a general rule the Oregon Supreme Court will not consider issues, including constitutional issues, unless they were first raised and preserved in the trial court. *Christensen v. Murphy*, 296 Or 610, 612, 678 P2d 1210, 1213 (1984); *Ensley-Koebel v.*

National Guaranty Properties, Inc., 279 Or 391, 395-96, 568 P2d 655, 657 (1977); *Travelers Indem. Co. v. American Ins. Co.*, 278 Or 193, 199, 563 P2d 684, 687 (1977); *Waller v. Rocky Mountain Fire & Cas. Co.* 272 Or 69, 81, 535 P2d 530, 536, (1975); *Smith Kline & French Laboratories v. State Tax Commission*, 241 Or 50, 57n.1, 403 P2d 375, 378n.1 (1965); *State By and Through State Highway Commission v. Helliwell*, 225 Or 588, 590-91, 358 P2d 719, 721 (1961). The same is true in the Oregon Court of Appeals. *Junck v. Wright*, 94 Or.App. 704, 708, 767 P2d 100, 102, *review denied* 308 Or 465, 781 P2d 1214 (1989); *Nelson v. Lane County*, 79 Or.App.753, 757-58, 720 P2d 1291, 1294, *affirmed* 304 Or 97, 743 P2d 692 (1986); *State ex rel. Swann v. Pearce*, 69 Or.App. 475, 476, 686 P2d 484, 454-55, *review denied* 298 Or 150, 690 P2d 506 (1984).

As shown above, petitioners raised their claim that the compensatory damage award violated their rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution for the first time in the Oregon Supreme Court. It was not properly raised there and was not passed upon by that court. This is fatal to petitioners' effort to secure further review in this Court. *TXO Production Corp., v. Alliance Resources*, 113 S.Ct. 2711, 2723 (1993); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-277 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988). In any event, the award was reasonable given the severity of the injuries.

There is and can be no serious claim that the punitive damage award here is constitutionally excessive under the Due Process Clause. When the Oregon Supreme Court compared the award in this case against the *Haslip* award (the then only award upheld by this Court against a claim that it was constitutionally excessive under the Due Process Clause) it concluded that the

awards were similar. Its implicit conclusion that the award here, like the *Haslip* award, is not constitutionally excessive under the Due Process Clause appears even more reasonable in light of the *TXO* decision. There, this Court upheld a $10,000,000 punitive damage award where there was only $19,000 in compensatory damages. As the *TXO* plurality concluded, even if the "actual value of the 'potential harm' to respondents" were measured at $1,000,000, the "disparity between the punitive award and the potential harm does not, in our view, "jar one's constitutional sensibilities."" *TXO supra* at 113 S.Ct. 2722. In *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 262, 279 and 282 (1989), this Court upheld, under the more restrictive standard of discretionary remittitur, a $6,000,000 punitive damage verdict 117 times as large as the compensatory damages verdict.

Thus, whether one looks at *TXO's* 526 to one ratio of punitive to actual damages or its 10 to one ratio of punitive to "potential" damages or *Browning-Ferris'* 117 to one ratio of punitive to compensatory damages, the 5.4 to one ratio of punitive to compensatory damages awarded here is quite conservative and certainly does not "jar one's constitutional sensibilities." Viewing the *TXO* award and the award here from the perspective of their impact on the respective defendants points to the same conclusion. *TXO's* net worth at the time of the award was approximately $2.5 billion while Honda's was approximately $5 billion. *TXO, supra*, 113 S. Ct. 2716n.9. Thus, as a percentage of net worth, the *TXO* award was four times as large as the award here. As Justice Scalia said in his concurring opinion in *TXO*, this due process challenge to the punitive damage award can be disposed of with the simple observation that "this is no worse than *TXO*." 113 S.Ct. at 2727.

In light of these decisions petitioners have not even

tried to argue that the award is constitutionally excessive under the Due Process Clause. The only reason suggested by petitioners for reviewing such an award is the plainly improper reason of seeking to change State law in the hope that Oregon courts will develop common law excessiveness standards more favorable to petitioners than is required by the Due Process Clause. Pet.11-12. *Browning-Ferris Industries, supra* at 492 U.S. 279. In any event, petitioners' procedural arguments are unfounded.

To begin with, as the Oregon Court correctly concluded, this Court's decisions in *Haslip* and *TXO* do not require that any particular form of procedure be employed in punitive damage actions as long as, on balance, they do not violate due process. In this case, it is undeniable that the procedures employed to guide and direct the jury's exercise of discretion far exceed those in *Haslip* and *TXO*. They included use of a "clear and convincing" evidentiary standard, withholding of evidence of ability to pay until a *prima facie* case for punitive damages had been made and seven legislatively determined objective criteria to be considered by the jury in awarding punitive damages.[2] Compared to the trial procedures in *Haslip* and *TXO*, petitioners do not and cannot claim that these far more rigorous procedures resulted in an unfair trial.

Moreover, as the Oregon Supreme Court correctly noted, there was meaningful post-trial judicial review of both the law and the evidence and the court undertook a comparative review of this award against this Court's existing precedent. Due process requires no more, even

---

[2]No instruction was given concerning the "total deterrent effect of other punishment" because petitioners had not been subjected to any such "other punishment."

in capital cases. *Pulley v. Harris*, 465 U.S. 37 (1984); *Lewis v. Jeffers*, 497 U.S. 764 (1990), *Walton v. Arizona*, 497 U.S. 639 (1990); *State v. Wagner*, 305 Or 115, 169, 178, 752 P2d 1136, 1170, 1176 (1988), *certiorari granted*, 492 U.S. 914 (1989) (judgment vacated and remanded for reconsideration in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989)), affirmed in relevant part, 309 Or 5, 16, 786 P.d 93, *certiorari denied*, 498 U.S. 897 (1990); *State v. Montez*, 309 Or 564, 607, 789 P2d 1352, 1379-80 (1990). Furthermore, as petitioners implicitly concede, this Court has never held that due process requires State judges to have the power on appeal to set aside jury verdicts awarding damages arrived at in trials that are free from error solely on the ground that the reviewing court disagrees with the jury's decision as to the amount of damages. In fact, from the founding of the Republic, the law has been exactly the opposite in both civil and criminal cases:

> *"There is no constitutional requirement that a State provide for an appeal at all. "It is wholly within the discretion of the State to allow or not to allow such review." If a State decides to confer a right of appeal, it is free to do so "upon such terms as in its wisdom may be deemed proper."* This decision was not a constitutional aberration. There was no right of appeal from federal convictions until 1889 when Congress granted a right of direct review in the Supreme Court in capital cases. In 1891 Congress extended this right to include "otherwise infamous crimes." Similarly, there was no right of appeal from criminal convictions in England until 1907. In both countries, the concept of due process in criminal proceedings is addressed almost entirely to the fairness of the trial." [Emphasis added, citations omitted.]

Evitts v. Lucey, 469 U.S. 387, 393, 409-410 (1985) (Rehnquist, J., dissenting.)

This rule, which flows inexorably from Congress's constitutional power under Article III, Section 2 to make "exceptions" to and otherwise "regulat[e]" this Court's jurisdiction,[3] *(Ex Parte McCardle*, 74 U.S. (7 Wall) 506, 514 (1869)) has become one of the most frequently invoked doctrines in this Court's jurisprudence. *McKane v. Durston*, 153 U.S. 684, 687 (1894); *Andrews v. Swartz*, 156 U.S. 272, 275 (1895); *Reetz v. Michigan*, 188 U.S. 505, 508 (1903); *Rogers v. Peck*, 199 U.S. 425, 435 (1905); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286-87 (1912); *Ohio v. Akron Park District*, 281 U.S. 74, 80 (1930); *Dist. Of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *Carter v. Illinois*, 329 U.S. 173, 175 (1946); *Brown v. Allen*, 344 U.S. 443, 486n.36 (1946); *National Union v. Arnold*, 348 U.S. 37, 43 (1954); *Griffin v. Illinois*, 351 U.S. 12, 18, 21, 27 (1956); *Douglas v. California*, 372 U.S. 353, 365 (1963); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ortwein v. Schwab*, 410 U.S. 656, 660, 665 (1973); *Ross v. Moffitt*, 417 U.S. 600, 606, 610-11 (1974); *Estelle v. Dorrough*, 420 U.S. 534, 536-37 (1975); *Woodson v. North Carolina*, 428 U.S. 280, 316 (1976); *Abney v. United States*, 431 U.S. 651, 656 (1977); *Jones v. Barnes*, 463 U.S. 745, 751, 756 (1983); *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 31 (1987); *Pennsylvania v. Finley*, 481 U.S. 551, 555-558 (1987); *Murray v. Giarratano*, 492 U.S. 1, 18 (1989); *Whitmore v. Arkansas* 495 U.S. 149, 167 (1990).

---

[3]"[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Similarly, no claim can be made that due process requires that State trial judges have the power to set aside jury verdicts arrived at after a fair trial. As this Court said in *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286-87 (1912):

> "[T]he power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. *What that point is can be determined by the legislative power of the State for right of appeal is not essential to due process of law.*" [Emphasis added.]

The Court has applied this doctrine to uphold against due process attack the State's power, by constitution, to make a jury's verdict final and unreviewable on similar fact dependent issues:

> "It may be assumed...that, if the question were open to a ruling of law, it would be ruled that plaintiff could not recover. But the Oklahoma Constitution provides that "the defense of contributory negligence...shall, at all times, be left to the jury"....*There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court*...As it may confer legislative and judicial powers upon a commission not known to the common law it may confer larger powers upon a jury than those that generally prevail." [Citations omitted, emphasis added.]

Chicago, R.I. & Pac. Ry. Co. v. Cole, 251 U.S. 54, 55-56 (1919); accord *Pittsburgh &c. Railway Co. v. Backus*, 154

U.S. 421, 426-27 (1894) ("Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings...If a single hearing is not due process, doubling it will not make it so....")

More recently this concept has been upheld in decisions of this Court reviewing State capital punishment systems attacked on due process grounds. In *Gregg v. Georgia*, 428 U.S. 153, 166 (1976), for example, this Court upheld a capital sentencing scheme even though "[i]n jury cases, the trial judge is bound by the jury's recommended sentence." This Court also upheld capital sentencing systems in Texas, California, Pennsylvania and Oregon that preclude the trial judge from substituting his judgment for the jury's decision to impose the death penalty. *Jurek v. Texas*, 428 U.S. 262, 269 (1976); *Blystone v. Pennsylvania*, 494 U.S. 299, 302 (1990); *Boyde v. California*, 494 U.S. 370, 374 (1990); *State v. Wagner*, 305 Or 115, 169, 178, 752 P2d 1136, 1170, 1176 (1988), *certiorari granted*, 492 U.S. 914 (1989) (judgment vacated and remanded for reconsideration in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989)), affirmed in relevant part on reconsideration, 309 Or 5, 16, 786 P2d 93, *certiorari denied*, 498 U.S. 897 (1990); *State v. Montez*, 309 Or 564, 607, 789 P2d 1352, 1379-80 (1990).

In sum, the jury's award in this case is plainly not constitutionally excessive in comparison with the awards upheld in *Haslip* and *TXO* and the post-verdict review was more than adequate since due process requires none at all. In any event, petitioners' award received comparative review in the Oregon Supreme Court, a level of judicial review not even required in capital cases. Petitioner has shown no sufficient reason why further review is needed to reconsider settled procedures long found sufficient under the Due Process Clause even in capital cases and no reason why such procedures here are not sufficient to

award mere money damages. It is time to lay this matter to rest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM A. GAYLORD
Gaylord & Eyerman, P.C.
1400 SW Montgomery
Portland, Oregon 97201
(503) 222-3526

DAVID A. ENGELS*
Banks, Newcomb & Engels
1212 Standard Plaza
1100 SW 6th Ave.
Portland, Oregon 97204
(503) 222-7475

RAYMOND F. THOMAS
Royce, Swanson, Thomas & Coon
900 American Bank Building
621 SW Morrison Street
Portland, Oregon 97205
(503) 228-5222

Counsel for Respondent
* *Counsel of Record*

DECEMBER 1993